No. 18198

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEPHAN RIESS and THELMA McKINNEY RIESS,

Appellants and Cross-Appellees,

vs.

C. W. MURCHISON and SIMI VALLEY DEVELOPMENT COMPANY,

Appellees and Cross-Appellants.

Appellants and Cross-Appellees' Consolidated Reply Brief on Appeal and Brief on Cross-Appeal.

LOEB AND LOEB,
ALDEN G. PEARCE,
FRANK E. FEDER,
ROBERT A. HOLTZMAN,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Appellants and Cross-Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED

CASES PAGE

No. 18198

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEPHAN RIESS and THELMA McKINNEY RIESS,

Appellants and Cross-Appellees,

vs.

C. W. MURCHISON and SIMI VALLEY DEVELOPMENT COMPANY,

Appellees and Cross-Appellants.

Appellants and Cross-Appellees' Consolidated Reply Brief on Appeal and Brief on Cross-Appeal.

INTRODUCTORY STATEMENT.

In the introductory portions of their brief, Appellees-Cross-Appellants (hereinafter referred to as "Appellees") make certain statements that require a brief response.

First, it should be noted that Appellees characterize their position, insofar as the application of the doctrine of breach by anticipatory repudiation is concerned, in the following language:

> "In brief, our position is that the Trial Court was correct in holding, as a matter of law, that the contract was not susceptible to the application of the doctrine of breach by anticipatory repudiation . . ." (Appellees' Br. p. 1).

As we have previously noted at some length, a holding to this effect would be contrary to the applicable state law (Appellants' Op. Br. Point I, pp. 20-53). More pertinently, however, the Trial Court did *not* so hold: rather, it adopted findings, prepared by Appellees, to the effect that Appellees had not repudiated their contract, and concluded from this that no anticipatory breach had occurred. Thus, the decision below rested, not on the legal ground presently advocated by Appellees, but rather on the factual basis advocated by them in the Trial Court. As we have indicated, the latter basis is equally indefensible (Appellants' Op. Br. Point II, pp. 64-71).

Second, Appellees are incorrect in their contention that the burden of showing the occurrence of a condition to their obligations was upon Appellants; the burden, under the contract in question and the circumstances of this case, was clearly upon Appellees (Point II, *infra*).

Third, Appellees appear to suggest (Appellees' Br. pp. 1-6, 7-8) that once payment of the down payment and sums required to be paid during the first two years following the consummation of the agreement had been made, the contract was in the nature of a lease calling for royalty payments, with payments dependent solely upon production. While the situation is to a limited extent analogous, the analogy may not be carried as far as Appellees seek to carry it. Appellants have delivered fee title to their properties, and can no longer claim any present right, title or interest or any right to a remainder or reversionary interest. The purchase price to which they are entitled under the agreement

is one million dollars; and while the rate at which payment is to be made is dependent upon production the right to ultimate payment of the entire amount is fixed.[1] Thus, the statement made by Appellees at page 8, that after the first two year period Appellants had the option to take water at the well head at the specified rate, or nothing, and elected to take nothing, is manifestly incorrect. Appellants' option was to take water at the well head in payment of a portion of the purchase price, or to wait until subsequent years and take payment in cash. The failure to exercise the option only delayed the payment, and in no way operated to discharge it. Furthermore, by the time the right to exercise the option matured for the first time, Appellees were in breach, Appellants had elected to treat the breach as an anticipatory breach, and an election to take water could well have operated as a waiver of substantial rights by Appellants.

Fourth, the suggestion that the jury was dismissed on the agreement and stipulation of the parties (Appellees' Br. p. 9), while technically correct, is misleading. As Appellees properly point out, the trial judge ruled that no issue of fact remained for jury determination. The trial judge rejected the suggestion of Appellants that the proper procedure would be to instruct the jury in accordance with the judg's legal rulings, and left Appellants no alternative other than to consent to the discharge of the jury. Manifestly, no one anticipated that the trial judge, having already indicated

[1]Of course, any further obligation on Appellees' part may be terminated by reconveyance of the water lands to Appellants, but Appellees have apparently disabled themselves from making such reconveyance [Clk. Tr. p. 281].

his rulings and his reasons therefor, would proceed to adopt findings, conclusions, and a judgment based upon those very matters he had ruled immaterial. It is not the discharge of the jury, in itself, that is objected to; it is rather the reversal of position, on the part of the trial court, that ultimately resulted in the entry of a judgment expressly based upon findings of fact which invade the province of the jury.

I.

THE DOCTRINE OF TOTAL BREACH OR BREACH OF CONTRACT BY ANTICIPATORY REPUDIATION IS APPLICABLE TO THE AGREEMENT IN THE CASE AT BAR.

A. The Rule of Law to the Effect That Unconditional Unilateral Contracts for the Payment of Money in Installments Are Not the Proper Subjects for the Doctrine of Anticipatory Breach Is Not Applicable.

As was to be expected Appellees have relied heavily on the line of cases which support the proposition that the doctrine of anticipatory breach is not applicable to certain types of contracts for the payment of money.

The cases relied on by Appellees represent the majority view as expressed by this Court and the California Supreme Court and we do not quarrel with it. However, Appellees in their attempt to demonstrate that the rule is applicable to the case at bar are forcing an extension of it to a type of contract not involved in the cases on which they rely and are thereby attributing to it a far reaching effect not intended or contemplated by the courts. We suggest that if indeed any modifications of the rule were to be made the courts would be

more inclined toward a restriction on its scope along the lines suggested in the cases expressing the minority view or the observations of Professor Corbin on the subject.

Placid Oil Company v. Humphrey, 244 F. 2d 184 (5th Cir. 1957);

4 Corbin on Contracts, §962 ff, p. 864 ff.

The language employed by the courts indicates that the rule is precise and, by its terms as well as its application, limited to a very narrow field of contracts. It is concerned with a particular type of agreement such as an insurance contract, a promissory note or a lease. This Court in *John Hancock Mutual Life Ins. Co. v. Cohen,* 254 F. 2d 417 (9th Cir. 1958) defined the rule as follows:

> "We conclude the general rule to be that the doctrine of anticipatory breach has *no application to suits to enforce contracts for future payment of money only, in installments or otherwise.* Cobb v. Pacific Mutual, supra; Flinn v. Mowry, supra; Brix v. People's Mutual Life Ins. Co., supra; Sulyok v. Penzintezeti, 279 App. Div. 528, 111 N. Y. S. 2d 75, 82; 105 A.L.R. 460; Restatement, Contracts, §§ 316-318; 5 Williston, Contracts, 3740 - 3743; 12 Cal. Jur. 2d, Contracts §§ 246-250; see also 24 Calif. L. Rev. 216." (emphasis added) (254 F. 2d at 426).
>
> ". . . But we find no indication in either the law of New Mexico or of California of an intent to depart from the majority view that *uncondi-*

tional unilateral contracts for the payment of money in installments are not the proper subjects for the doctrine of anticipatory breach." (emphasis added) (254 F. 2d at 426-427).

If the rule, as defined in the *John Hancock* case, is applied to the agreement in the case at bar the conclusion is inescapable that this agreement does not come within its terms.

1. The Agreement Is Not Unconditional.

Appellees themselves acknowledge the agreement to be conditional for they assert that their obligation to construct and install the pipelines and reservoir by June 12, 1958, was conditioned on there being sufficient water and they further claim that the water was not sufficient, thus excusing their performance. Appellees conclude "there can be no repudiation through failure to perform a conditional obligation when the condition has not been met, . . ." citing *Clarey v. Security Portland Cement Co. Inc.,* 99 Cal. App. 783 (1929) (Appellees' Br. p. 19). We are unable to discover any language in the *Clarey* opinion in support of this proposition, but regardless of whether or not it is a correct statement of the law it is in any event inapplicable because by failing to construct and install the reservoir and pipelines prior to June 12, 1958, and prior to the time this lawsuit was commenced, Appellees thereby placed it out of their power to go forward with the development of the Montgomery lands for residential and industrial purposes as contemplated by the agreement, and thus rendered meaningless their implicit undertaking to produce, save and sell water and their express obligation to make payment therefor to Appellants. This is precisely the type of

situation in which the doctrines of anticipatory breach or total breach are said to be applicable.

Wolf v. Marsh, 54 Cal. 228 (1880);

Grant v. Warren, 31 Cal. App. 453, 160 Pac. 847 (1916);

Restatement of Contracts, §317, Comment (b).

Since Appellees make much of their argument that the agreement was conditional (Appellees' Br. pp. 42-50) it is difficult to ascertain how they can at the same time insist that the limiting rule which is applicable only to *unconditional* contracts can be invoked.

2. The Agreement Remained Bilateral.

This point has heretofore been discussed in some detail in Appellants' Opening Brief, pages 26-28, wherein the several covenants and duties, express and implied which remained unperformed are set forth. A further example of its bilateral nature, and one not previously referred to is found in Paragraph (h) of the agreement, wherein it is provided that Appellees at their election, if they determined the water to be insufficient, could reconvey the wells to Appellants and further provided that Appellants would then be obligated to accept them and to relieve Appellees from any further obligations under the agreement. The informative discussion on this entire subject of anticipatory breach and the limiting rule found in the dissenting opinion in *Federal Life Ins. Co. v. Rasco,* 12 F. 2d 693, 695-696 (6th Cir. 1926), contains a comment on the meaning of the term "executory" or "bilateral" as it relates to the application of the restricting rule. It was there observed that a contract is deemed to be executory as against plaintiff if it requires him to do something so that an

action may lie against him for specific performance or for non-performance if he fails to perform. So, applying this test to the case at bar, undoubtedly Appellees could have brought an action against Appellant Stephen Riess if he had refused to locate additional wells as required by Paragraph (c) of the agreement; or an action for specific performance could have been brought by Appellees based on Appellants' alleged refusal to arbitrate.

By their argument to the effect that Appellants in the absence of cash payments were obligated to demand payment in kind, *i.e.*, water (assuming for the moment that the argument has any merit) Appellees themselves call attention to yet another provision of the agreement which remained executory and unperformed (Appellees' Br. pp. 27-28). Furthermore, by retaining the wells and refusing to construct the water system prior to June 12, 1958, Appellees as a result were in breach of their covenant of good faith and fair dealing and their obligation to diligently go forward with the objects and purposes of the agreement which the law under these circumstances will imply.

Winegar v. Gray, 204 Adv. Cal. App. 332, 22 Cal. Rptr. 301 (1962).

3. The Agreement Is Not a Simple Contract for the Payment of Money in Installments.

Appellees have devoted considerable energy to an explanation as to why the agreement must necessarily be found to be one for the payment of money in installments (Appellees' Br. pp. 12-24). We concede that in part the agreement most certainly did call for the payment of money in installments in undetermined amounts

measured by the quantities of water produced, saved and sold. But it also required the performance by Appellees of certain acts. The most important of these acts, from the Appellants' standpoint, was the construction and installation of the pipelines and reservoir prior to June 12, 1958. In addition, Paragraph 5 of the agreement required Appellees to perform other acts. Appellees, however, with equal enthusiasm have asserted that the agreement does not call for payment of money in installments but rather that it imposes an obligation to pay in kind (Appellees' Br. pp. 27-30). This argument, we submit, is self defeating since the very rule which Appellees seek to invoke is limited solely to contracts requiring the payment of money in installments.

4. The Restricting Rule Is Not Applicable to Indivisible Contracts Calling for Performance of Connected Acts.

It is immaterial really whether the agreement is found to be bilateral or unilateral, conditional or unconditional, or whether in other respects it meets the test set forth in the *John Hancock* case, because the California Supreme Court has held that in any event the restrictive rule *does not apply where the acts to be performed by the promisor are connected with one another and the thing to be accomplished by the contract is total.*

Gold Mining & Water Co. v. Swinerton, 23 Cal. 2d 19, 29-30, 142 P. 2d 22 (1943);

Restatement of Contracts, §316.

Although a detailed analysis of the agreement demonstrating its indivisibility and elaborating on the ways in which the various acts and obligations were interconnected has previously been made (Appellants' Op. Br. pp. 36-37, 41-42), a further examination seems in

order in view of the importance of the point. We have observed that pursuant to the provisions of this agreement Appellees purchased the water wells from Appellants to provide water for the Montgomery lands which they proposed to develop for residential and industrial purposes. A portion of the purchase price was paid to Appellants but by far the greater part of it was to be paid over a period of time in amounts to be determined by the quantity of water produced, saved and sold. Water could be produced, saved and sold only if a water system were constructed to convey the water from the wells to the Montgomery land and Appellees agreed to construct that water system within two years from the date of consummation of the purchase (June 12, 1956). By entering into this bargain Appellants thereby gave up all their right, title and interest to the water wells and Appellees thereafter were in complete control thereof and they alone had the power to determine their fate. The only express protection Appellants had to assure payment of the unpaid balance of the purchase price was the provision requiring Appellees to construct the water system, the existence of which would enable the water from the wells to be marketed. The only other protection which Appellants had was the implied obligation of good faith on the part of Appellees to go forward diligently with the development of the Montgomery land and to carry out the purposes of the agreement to the end that water could be produced, saved and sold and payment made therefor to Appellants. On the other hand, in the event any question developed concerning sufficiency of the water wells, Appellees had ample protection because they had the right to relieve themselves of all obligations under the agreement at any time by

reconveying the wells to Appellants. Appellees did not construct the water system prior to June 12, 1958, subsequently claiming excuse because of insufficiency of water. However, they did not exercise their right to reconvey the wells so as to be relieved of their obligations under the agreement. On the contrary, to this day they have retained the water wells (which they claim to be insufficient), have constructed the water system (which they say they were excused from constructing), and have used the "insufficient" water over a period of years for a variety of purposes, all without any payment to Appellants since September, 1957. The conclusion to be drawn, we believe, is that this was indeed an indivisible contract requiring the performace of interrelated acts and the type of agreement which the courts have uniformly found to be subject to the doctrine of anticipatory breach.

B. The Proposition That an Obligation to Be Performed in Installments Cannot Be Accelerated in the Absence of an Acceleration Clause Is Not Supported by the Authorities.

Appellees have asserted as a bare legal proposition that an obligation to be performed in installments cannot be accelerated in the absence of an acceleration clause (Appellees' Br. pp. 30-31). This contention finds no support whatever in the authorities cited by Appellees and certainly the law applicable, as expressed by the leading cases in which the doctrine of anticipatory breach has been invoked, is directly contrary. For example, in *Gold Mining & Water Co. v. Swinerton, supra,* where the contract in question was a ten year mining lease with payments therefor to be made in in-

stallments and in amounts which were to be determined by production from the mine, the court stated as follows:

> ". . . Clearly, the lease contemplated the continuous extraction of minerals by lessees as one entire obligation. *The mere fact that the royalties were payable monthly and that 300,000 cubic yards were to be worked annually* carries no implication that each payment of royalties was severable from the other, or that each year's output of 300,000 cubic yards was severable from every other year. Rather the one was merely a specification of the time for paying whatever the royalties there might be and the other a minimum below which the output should not fall. *It is not like the case of money payable in fixed installments.*" (emphasis supplied) (23 Cal. 2d at 29-30).

See also:

Coughlin v. Blair, 41 Cal. 2d 587, 262 P. 2d 305 (1953);

Grant v. Warren, 31 Cal. App. 453, 160 Pac. 847 (1916);

Love v. Mabury, 59 Cal. 484 (1881).

Appellees could only justify such a conclusion if they assumed not only that the agreement fell within that narrow field of contracts which are unilateral, unconditional and require only the payment of money in installments, but also that it was not an indivisible contract calling for the performance of interrelated acts, and that they had not at the time of the breach placed it out of their power to perform as to a substantial part.

C. At No Time Have Appellants Sought to Convert the Agreement to an Obligation to Pay in Kind or to in Any Way Rewrite It.

Appellees, as we have seen, insist that the bargain was limited to the right of Appellants to receive and to the obligation on Appellees' part to pay monies in installments in amounts determined by quantities of water produced, saved and sold and therefore the doctrine of anticipatory breach is not applicable under the restriction laid down in the *John Hancock* and related cases (Appellees' Br. pp. 12-24). That there is no support for this contention to be found in the language of the agreement has hereinabove been demonstrated under subheading A. Yet when it suits them Appellees argue that Appellants' bargain was limited to their right to receive and an obligation on Appellees' part to pay the balance of the consideration in kind (Appellees' Br. pp. 27-28) and that Appellants, having waived the right to demand payment in kind, could not in any event invoke the doctrine of anticipatory breach. This argument, however, completely loses sight of the fact that under Paragraph 2(b) of the agreement the earliest moment that Appellants could have given notice demanding payment in kind, assuming they elected to exercise this right, was thirty days after June 12, 1959, the end of the first accounting year. Appellants by commencing this action for anticipatory breach in October, 1958 thereby made final their election to treat the agreement as terminated and any demand for payment in

kind thereafter would have been totally inconsistent with this election. Moreover, such action by Appellants might then have been treated as a waiver or an estoppel so as to preclude Appellants from successfully asserting the doctrine of anticipatory breach. The argument completely overlooks the fact that an integral part of the consideration of this agreement was the obligation imposed on Appellees to construct and install the reservoir and pipelines, that Appellees were already in breach of their obligation to pay the balance of the $48,000.00 owed for the first two year period, and that Appellees had stated they would not perform in accordance with the terms of the agreement. Upon the failure of Appellees to perform that obligation to construct and install, the breach then became a total breach and was so treated by Appellants. Under these circumstances the law treats the promise as absolute and unconditional and holds the promisor to the obligation to pay the balance in cash.

Grant v. Warren, supra;
Coughlin v. Blair, supra;
Gold Mining & Water Co. v. Swinerton, supra.

Thereafter, if the injured party elects to bring suit for total breach or breach by anticipatory repudiation, as in the instant case, the contract ceases to exist for all purposes except to determine damages.

Winegar v. Gray, supra;
Coughlin v. Blair, supra;
Alder v. Drudis, 30 Cal. 2d 372, 182 P. 2d 195 (1947).

II.

THE CONTENTION THAT APPELLEES WERE NOT OBLIGATED TO CONSTRUCT OR INSTALL A RESERVOIR AND PIPELINES OR THAT THEY WERE EXCUSED FROM PERFORMANCE IS NOT SUPPORTED BY THE FACTS OR THE APPLICABLE LAW.

A. The Question of Sufficiency of Water, if It Was a Condition at All, Was a Condition Subsequent.

The Appellants have alleged that the wells now located on the water lands were physically able to produce sufficient quantities of water so as to adequately service the Montgomery lands and that the water lands were capable of commercially producing many millions of gallons. The Appellees have denied these allegations and have affirmatively asserted that the wells were not capable of commercially producing many millions of gallons, that they were not sufficient to service the Montgomery lands, and that they were not sufficient to supply water to more than 200 acres [Clk. Tr. pp. 24, 28-29, 71, 74, 153, 154, 156, 158]. The question of sufficiency, Appellants maintain, is related to facts which are such that, if it can be said that any condition is created at all, give rise to a condition subsequent which is a matter of proof for Appellees.

The agreement gave Appellants the right to have the pipelines and reservoir installed and constructed by the Appellees prior to June 12, 1958. That right was subject to termination, say Appellees, if the water was insufficient to service the Montgomery land. Since it is true that a condition precedent fixes the beginning of a right while a condition subsequent fixes the end, it is clear that the question of sufficiency in this instance

could only be a condition subsequent. Stated differently, the contract imposed on the Appellees the obligation to construct and install the pipelines and reservoir prior to June 12, 1958, and the contract provided further that Appellees might be relieved of their obligation if there was insufficient water. This factual situation then falls precisely within the definition of a condition subsequent as set forth in the California Civil Code:

> "§1438. *Condition subsequent.* A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition."

Since the provision excusing performance by the Appellees is solely for their benefit and is subject to their discretion to invoke it, should that condition fail to occur it is, as a consequence, a matter to be relied upon by way of defense and the burden of proof necessarily must fall on the Appellees to establish its occurence. A case directly in point under circumstances nearly identical with those in the instant case, holding that sufficiency, or lack of it, is a matter to be established by a preponderance of the evidence by defendants is *Fort Worth Sand & Gravel Co. v. Peters,* 103 S. W. 2d 407 (Tex. Civ. App. 1937). There plaintiff as lessor entered into a lease with defendant in July, 1928, whereby he leased 40 acres of land, along with the exclusive use of a certain railroad track and ingress and egress rights. Defendant agreed to pay plaintiff a royalty of 10 cents per cubic yard for all gravel and sand taken from the premises and further agreed if it did not take enough sand and gravel during a month so that royal-

ties equalled $200 it would pay that amount as a minimum, provided, that if the $200 exceeded the amount due lessor based on yardage removed lessor thereafter and before expiration of the lease could remove sand and gravel to the extent of that excess. The lease provided further that if sand and gravel became exhausted or the quality was such that it could not be mined with reasonable profit then on 30 days notice defendant might terminate the lease. The lessee took possession under the lease and made monthly payments until May, 1930, when it gave notice of termination. Plaintiff sued for $2,700, the minimum royalty promised for the unexpired term. Defendant claimed it entered into the lease believing there to be sufficient sand and gravel of good quality and that the parties made a mutual mistake as to this; that the consideration failed because of the absence of sand and gravel in sufficient quality and quantity to permit mining at a reasonable profit; that it had expended substantial sums of money in connection with the lease; and that the contract permitted such a termination. Plaintiff claimed that defendant made its own tests to satisfy itself as to quantity and quality; that defendant made no bona fide attempt to mine the sand and gravel prior to breach; that the sand and gravel were of sufficient quality and quantity and could have been mined at reasonable profit. In deciding for plaintiff the court stated that defendant, in order to terminate the lease, must allege and prove the happening of the condition and provisions specified in the contract. If defendant was not justified in terminating the lease then plaintiff was entitled to recover the minimum royalty payments for the remainder of the life of the contract and plaintiff was only re-

quired to prove as to the amount of damages suffered the minimum contracted to be paid under the contract. The court held with respect to the question of quality and sufficiency that since defendant challenged the right of plaintiff to recover by reason of certain exceptions and that by reason of the exceptions there was no liability on defendant and special issues based on such exceptions were submitted to the jury, it was proper to instruct the jury that the burden of proof was on defendant to establish by a preponderance of the evidence that the condition or exception existed.

In *Oosten v. Hay Haulers, etc.*, 45 Cal. 2d 784, 291 P. 2d 17 (1955), the rule is enunciated that where the defendant alleges an affirmative defense to an action for breach of contract such as impossibility, frustration, failure of consideration or other typical affirmative defenses which are not expressly provided for in the contract, the burden of proving the fact constituting the defense is on the defendant. Such a rule would seem by analogy to be as applicable to cases such as the one at bar, where non-occurrence of a condition is the affirmative defense asserted.

B. Assuming Sufficiency of Water Was a Condition Precedent, the Burden of Proof to Establish Non-Occurrence of the Condition Was Nevertheless on Appellees.

Even if it is conceded for the sake of argument that the question of sufficiency did create a condition precedent it is nevertheless well established that in certain instances the existence of a condition precedent will be assumed unless it is disproved by the defendant. For example, there are cases wherein a fact is clearly a con-

dition precedent to the duty of defendant but the circumstances concerning it are particularly within the knowledge of defendant. In such instances the court quite properly has made the assumption that the condition did occur unless the defendant proves that it did not.

Southwest Federal Savings & Loan Ass'n v. Cosmopolitan National Bank, 23 Ill. App. 2d 174, 161 N. E. 2d 697 (1959);

Stoddard v. Illinois Improvement & Ballast Co., 275 Ill. 199, 113 N. E. 913 (1916);

3A Corbin on Contracts, pp. 142-143, 467-468.

Appellees contend that Paragraph 3 of the agreement indicates the promise of the Appellees to construct the water system was conditioned on there being an adequate supply of water and that the failure to construct the water system and proceed with the development of the Montgomery land prior to June 12, 1958, was occasioned by the insufficiency of the water available from the water lands to develop the Montgomery acreage for subdivision and commercial uses. If a fact is a condition precedent to the promisor's duty of performance, its absence or non-occurrence is a defense in an action brough against the promisor for breach of his promise. Nevertheless, the party who must assume the burden of allegation, of going forward with the evidence and of persuasion may be ascertained, not by the nature of the fact or event necessarily, but by other facts or events such as actual possession of documents, personal participation in the transaction, easy access to information available to one party and not the other.

3A Corbin on Contracts, pp. 143, 467-468, 475.

Consequently, even if we view the language in Paragraph 3 in the light most favorable to Appellees' contention that sufficiency was a condition precedent to Appellees' duty to construct, the fact that it may be a condition precedent may alone be insufficient to require Appellants to shoulder the burden of proving the fulfillment of that condition. The cases indicate the weight given to other factors.

For example, in *Fleming v. Harrison,* 162 F. 2d 789 (8th Cir. 1947) the court stated:

> "It has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact more peculiarly within his knowledge or of which he is supposed to be cognizant." (162 F. 2d p. 792).

See also:

Selma, Rome etc. Railroad v. United States, 139 U. S. 560, 11 S. Ct. 638, 35 L. Ed. 266 (1891);

Butler v. Nepple, 54 Cal. 2d 589, 354 P. 2d 239 (1960);

3A Corbin on Contracts, p. 73.

To similar effect are the cases which hold that where facts are within the knowledge of the defendant, the plaintiff in order to shift the burden of proof need produce only slight evidence.

Luttrell v. Columbia Casualty Co., 136 Cal. App. 513, 28 P. 2d 1067 (1934);

Kleinpeter v. Castro, 11 Cal. App. 83, 103 Pac. 1090 (1909);

Joost v. Craig, 131 Cal. 504, 63 Pac. 840 (1901).

In our situation, Appellees were in exclusive possession of the water lands and the water wells; they had caused tests of the wells to be made; only they were in possession of knowledge concerning the development plans for the Montgomery lands; only they had knowledge of the amount of water which might be required for that development. It is clear, therefore, that the facts which would be required to establish whether or not the wells could produce sufficient water were peculiarly within Appellees' knowledge. Under such circumstances it would be unfair in the extreme to impose the burden of proving sufficiency of water on the Appellants where it is Appellees who, by reason of their exclusive knowledge of their water requirements, their exclusive possession of the wells and water lands for over six years and their exclusive possession of all information as to the quantities of water produced and the uses to which such water was put during that period, have special knowledge of all of the relevant facts.

Appellees claim further that Appellants were required not only to assume the burden of proving the existence of this condition but to plead the facts demonstrating occurrence of the condition (Appellees' Br. p. 45), and they assert that Appellants have not complied. If the condition were found to be a condition subsequent this would not be the case, but in any event Appellees are inaccurate because Appellants did allege compliance with the condition in the amended complaint [Clk. Tr. pp. 24, 28-29]. The question of who must assume the burden of proof was never reached in the trial due to the ruling of the trial judge that sufficiency of water was not an issue in the case.

These allegations of facts concerning sufficiency of the water found in the Amended Complaint may very well have been unnecessary or superfluous since they could have been and were alleged in defense. But the burden of proof does not shift to Appellants merely because they have made such allegations. A case squarely in point in that connection is *Bell v. Pleasant,* 145 Cal. 410, 78 Pac. 957 (1904), holding that plaintiff was required to prove only those facts necessary to its cause of action, and if it had alleged facts not necessary but which might have been alleged in defense and those facts were denied, this would not shift the burden of proof nor would it require plaintiff to introduce any evidence on the subject until defendants had produced evidence making a rebuttal necessary.

See also:

Lloyd v. Kleefisch, 48 Cal. App. 2d 408, 120 P. 2d 97 (1941).

For our purposes therefore, it is immaterial whether the condition is found to be precedent or subsequent for the burden of proving the non-existence of the condition must in any event fall upon Appellees.

C. Appellees Have Waived Their Right to Assert That the Obligation to Construct or Install Pipelines Was Subject to a Condition Precedent.

It is conceded by Appellees that they did not construct or install the pipelines and reservoirs prior to June 12, 1958, but that subsequently in or around 1960 they did commence the construction and installation work and did in fact complete it in 1961 so that pipelines were extended from the wells to each of the parcels comprising the Montgomery property, as required by the

agreement. It is conceded also that they have retained the wells and all of the property conveyed to them by Appellants; that they have used the water for irrigation purposes in connection with grazing cattle and the raising of alfalfa, for construction purposes and for domestic use at the residence; that they have furnished water to two mutual water companies; and that they have made no payments whatever to Appellants since September, 1957. Appellees even concede that they were dependent on such water as there was for development of a portion of the Montgomery land yet they contend that the water was nevertheless insufficient to service the Montgomery land for residential and industrial purposes. [Clk. Tr. pp. 71, 74, 153, 154, 156, 158, 253-254, 256-257]. It is submitted that Appellees have by such statements and conduct waived or abandoned any right they might otherwise have had, or excuse they might otherwise have asserted, based on nonexistence of a condition because they have proceeded to perform the very acts which they were obligated to perform under the agreement and which they contend they were excused from performing because of the insufficiency of water. In other words, Appellees by proceeding to render the performance which they claim was excused with the knowledge that the condition of sufficiency was not fulfilled thereby recreated their former duty and are precluded from now asserting the nonexistence of the condition to which it was subject.

The applicable California rule is set forth in *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 163 Pac. 1017 (1915). This was an action by plaintiff to obtain a decree to the effect that defendant's rights under a

contract were terminated. Plaintiff was the owner of a 400 acre parcel of land and also an undivided ¾ interest in a neighboring 1400 acre parcel. Both parcels were valuable chiefly for timber. Plaintiff granted defendant the right to take, cut, haul and carry away timber upon prompt payment therefor at the rate of $2.25 per 1,000 feet of timber from the first tract and $1.68 per 1,000 feet from the second tract. Defendant agreed to erect a sawmill on the premises to have a certain capacity and to be constructed and ready to commence manufacturing and shipping operations *as soon as there was constructed and in operation a railroad from Santa Cruz crossing Gazos Creek.* Although the railroad was not completed defendant proceeded to and did construct and operate the sawmill. Plaintiff contended that although the railroad was not completed defendant had nevertheless constructed the mill and was therefore obligated to manufacture, ship and pay for lumber. Defendant claimed that the building of the railroad was a condition precedent to its obligation to manufacture and ship lumber and that it was not obligated to do this until such time. In holding for the plaintiff the court concluded the parties intended that certain timber should be removed from the land, but with respect to a beginning time for such removal it was not an agreement which defendant could indefinitely postpone, otherwise the purpose and benefit of the contract would be destroyed. This right to delay construction until completion of the railroad was said to be a privilege accorded to the defendant and accordingly could be waived. Defendant did waive it by constructing the sawmill and operating it and so brought about the event upon which its obligation to

manufacture rested. The court noted as significant factors that the land was chiefly valuable for timber, that the contract contemplated cutting it, that plaintiff was precluded from using the land while the contract was in force, and that defendant had an option to purchase the land.

See also:

LaMiller v. St. Claire Packing Co., 99 Cal. App. 2d 518, 222 P. 2d 75 (1950).

In order to determine whether a party has waived or surrendered a right which he might have had, it is not necessary to prove express language to such effect. On the contrary, this may be established by circumstances, a course of declarations, acts or conduct.

Alpern v. Mayfair Markets, 118 Cal. App. 2d 541, 253 P. 2d 71 (1953);

Waldteufel v. Sailor, 62 Cal. App. 2d 577, 144 P. 2d 894 (1944);

Bettlhein v. Hagstrom Food Store, 113 Cal. App. 2d 873, 240 P. 2d 301 (1952);

Wenzel and Henoch Construction Co. v. Metropolitan Water District, 115 F. 2d 25 (9th Cir. 1940).

In this connection Professor Corbin has made the following observation:

> "The primary contractual obligation of one whose duty is subject to a condition precedent is terminated just as soon as that condition can no longer be performed . . . Nevertheless, such a contractor has power to recreate his former duty—

sometimes by a mere voluntary expression of waiver—and nearly always by continuing to render his own performance or by receiving further performance from the other party with knowledge that the condition has not been performed."

3A Corbin on Contracts, p. 497.

The acts, conduct and circumstances in the case at bar which are conceded to have existed demonstrate conclusively that Appellees have waived and surrendered their right to now assert in defense of their failure to perform, excuse or nonexistence of a condition.

D. The Claim of Insufficient Water by Appellees Was Not Made in Good Faith.

In ruling that the question of sufficiency of water was not relevant or material to the issues in the case at bar [Rep. Tr. p. 365] the trial judge relied on the language of the agreement itself. He made the following observations: Appellees were given a period of nine months within which to test the wells and satisfy themselves as to sufficiency before they consummated the purchase, and they in fact did make an investigation and conduct tests; they were granted the right to return the wells at any time and be relieved of their obligation if not satisfied with the sufficiency, but they have retained the wells and have not reconveyed them; they were required to make certain payments to Appellants against the total purchase price remaining unpaid and they failed to make any further payments after September, 1957. The trial judge stated in this connection that Appellees could not acquire the wells, hold on to them, use them and refuse to pay for them and

he concluded quite properly that Appellees' acts and conduct were totally inconsistent with their claim of insufficiency [Rep. Tr. pp. 65, 66, 69, 365]. The trial judge must have reasoned that if there had existed a genuine concern as to sufficiency on the part of Appellees they would not have gone ahead to eventually construct the water system thereby incurring considerable expense [Clk. Tr. p. 253] but would have exercised their right to return the wells and avoid further liability, and that their claims of insufficiency therefore must not have been made in good faith.

III.

THE ORDER MADE BY THE TRIAL COURT DENYING APPELLEES' APPLICATION FOR A STAY OF PROCEEDINGS PENDING ARBITRATION WAS PROPER.

A. The Court of Appeals Has No Jurisdiction to Entertain an Appeal on This Point, the Right to Appeal Having Heretofore Been Waived by Appellees.

Appellees now contend that the District Court erred in not staying proceedings pending arbitration of the issue as to sufficiency of water and they further claim that their motion for a stay was properly framed under Rule 12(b)(1) of the Federal Rules of Civil Procedure and 9 U. S. C., Sections 1-4. Apparently, Appellees in asserting error are relying on their motion made on May 11, 1961 [Clk. Tr. pp. 201-202] and the trial court's ruling thereon although it should be noted that certain of their prior motions for a stay were based on the California arbitration statutes [Clk. Tr. pp. 54-58, 65-66, 77-78]. Significantly, no appeal was

taken by Appellees from the adverse rulings of the trial court on any of the occasions on which said motions were made although it is settled that where there is a special defense setting up an arbitration agreement as an equitable plea (as in the case at bar) and there is a denial of a motion for a stay, that decision is an appealable interlocutory order.

Gatliff Coal Co. v. Cox, 142 F. 2d 876 (6th Cir. 1944);

Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583 (1935);

Hanover Motor Exp. Co. v. Teamsters Chauffers Helpers and Taxicab Drivers, 217 F. 2d 49 (6th Cir. 1954).

Accordingly, Appellees must now be deemed to have waived their right to an appeal on this point. Furthermore, the Court of Appeals at this time, has no jurisdiction to entertain an appeal purportedly taken from an interlocutory order entered over nine months prior to the notice of appeal.

9 U. S. C. §§3, 4;

28 U. S. C. §2107.

B. The Requirements of the Federal Arbitration Act, if Applicable, Have Not Been Met by Appellees.

Assuming for the purposes of the brief that the Court of Appeals does have jurisdiction to entertain the appeal from this order and that there has been no waiver by Appellees and assuming further that the Federal Arbitration Act is applicable, it can be readily

observed that Appellees have not brought themselves within the provisions of the Act. The Act requires (i) a contract evidencing a transaction involving commerce; (ii) an arbitrable issue; (iii) that the party seeking arbitration not be in default; and (iv) enforceability of the arbitration clause under applicable state law. None of these elements is present in the case at bar.

1. The Agreement Does Not Evidence a Transaction Involving Interstate Commerce.

It is clear that in order for the Federal Arbitration Act to be applicable the contract must involve a maritime transaction or interstate commerce.

> *Bernhardt v. Polygraph Co.*, 350 U. S. 269, 100 L. Ed. 199, 86 S. Ct. 273 (1956);
>
> *Kirschner v. West Company*, 185 F. Supp. 317 (E. D. Pa., 1960).

Obviously there is no maritime transaction involved here. It seems equally obvious from an examination of the agreement that the transaction does not have the faintest connection with commerce as that term is defined in Section 1 of the Act. The agreement contemplates the sale by Appellants of certain water wells and adjacent lands for a total purchase price of $1,000,000.00 to be paid for in installments over a period of time, plus 1/6 of the common stock of Simi. The wells and adjacent lands are all in California; the Appellants reside in California; the property to be developed and served by the wells is in California; Simi, although a Delaware corporation with an office in Dallas, Texas, carries on its operations exclusively in

California. It would indeed be difficult to imagine a situation so utterly removed from commerce as the transaction presented in the instant case.

The fact that Texas law may apply for purposes of construing the arbitration clause has nothing whatever to do with commerce. It arises from the fact that the original parties to the contract were residents of different states. The contract, as it happened, was executed in Texas creating a conflict of laws question but in a diversity case such as this conflicts questions frequently arise. Certainly, however, this does not affect or involve commerce even under the broadest interpretation.

2. There Is No Arbitrable Issue Before the Court.

It is essential under the federal act for the Court to satisfy itself that there is an issue susceptible of being arbitrated before it can order a stay. In this connection it is important the arbitration clause be read in its proper context. The provision is contained in Paragraph (f) of the agreement and by its terms relates solely and specifically to Paragraph 3 which reads as follows:

> "3. Subject to the physical ability of the well or wells now or hereafter located on the Water Lands to produce sufficient quantities of water so as adequately to service the lands covered by the Montgomery Contract with an adequate supply of water, contemplating that such lands will be developed for residential and industrial usages, I agree within two years from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, to install

> or construct or to cause to be installed or constructed a reservoir and pipe lines to transmit water produced from the Water Lands at least to the nearest boundaries of each of the three tracts of land covered by the Montgomery Contract." [Pltf. Ex. 1 in evid.].

The 2-year period referred to ended on June 12, 1958. The Appellees at that time had not constructed the reservoir and pipelines as required. They claimed they were excused from so doing because of insufficient water. In October, 1958, Appellants brought this action claiming default by Appellees and breach of contract by anticipatory repudiation. Thereafter, Appellees continued to hold the property and water wells conveyed to them by Appellants and subsequently, in 1960, commenced the construction of the pipelines and the reservoir completing it in 1961. As set forth in detail hereinabove (Point II), they have continued during this period to use the water for a variety of purposes.

Obviously then there was no bona fide controversy over sufficiency since not only have Appellees retained the lands and wells and continued to use the water for a variety of purposes but they performed the very act which they claimed was conditioned on sufficiency of water and thus did the very thing which would have been required of them had they been unsuccessful in an arbitration proceeding. There remains therefore no arbitrable issue to be decided.

3. Appellees Are in Default and Are Estopped From Asserting or Have Waived Any Right to Arbitration.

(a) Section 3 of Title 9 provides that a stay may be had provided "the applicant for the stay is not in default in proceeding with such arbitration." That Appellees are in default is amply demonstrated by their acts and conduct since the filing of this lawsuit.

The first occasion on which Appellees applied for a stay pending arbitration was June 30, 1959, nearly nine months after this action was filed [Clk. Tr. pp. 54-55]. This motion and all subsequent motions were denied by the trial court. In October, 1959 and thereafter Appellees proceeded with those matters which were consistent with preparation for trial such as filing a third party complaint, answers and counterclaims seeking declaratory and equitable relief; taking depositions; participating in pre-trial conferences; filing a memorandum of contentions of law and fact [*e.g.,* Clk. Tr. pp. 70, 150, 152, 164, 182, 190]. At no time did Appellees apply for specific performance of the arbitration provisions as they were entitled under 9 U. S. C. Section 4, nor did they appeal from the orders of the trial court denying their motions.

Under similar circumstances courts have held that the party is in default and has waived his right to arbitration or estopped himself from claiming such right. The theory is that a party cannot pursue two inconsistent courses of action—he must prosecute his claimed right to arbitrate—or he must go forward to trial, he cannot do both. That is precisely what Appellees have attempted here. For example, it has been held that a party to a contract containing an arbitration

clause was in default because it appeared, filed an answer to the complaint, set up a counter-claim for damages, requested a continuance on the ground that a material witness was absent and, in this instance, only moved for arbitration on the day set for trial.

Radiator Specialty Co. v. Cannon Mills, 97 F. 2d 318 (4th Cir. 1938).

See also:

American Locomotive Co. v. Gyro Process Co., 185 F. 2d 316 (6th Cir. 1950);

American Locomotive v. Chemical Research Corp., 171 F. 2d 115 (6th Cir. 1949).

(b) Also relevant in determining whether Appellees are in default and thus not entitled to relief under Section 3 are the actions and conduct of Appellees totally at odds with their insistence on arbitration. These have been set forth under Point I and Subsection (a) hereinabove and, accordingly have not been repeated here.

4. **A Federal Court Cannot Compel Arbitration Where It Could Not Be Compelled in State Court.**

(a) The decision in *Bernhardt v. Polygraph Co., supra,* makes it abundantly clear that the right of arbitration does not owe its existence to federal law. The Federal Court only enforces the state created right by rules of procedure, required by the federal act, not necessarily the same as state procedure. So in a diversity case, such as we have here, the federal court enforcing a state created right is only another court of the state. As pointed out in the *Bernhardt* case, arbitration carries no right to a jury trial: arbitrators do

not have judicial instruction on the law; arbitrators need not give reasons for the result; the record is not complete; judicial review of an award is restricted. Accordingly, the courts have concluded that the question of arbitration is a substantive one, likely to effect the outcome of any case. Therefore, in diversity cases federal courts look to the law of the forum to determine whether proceedings should be stayed pending arbitration, including, if relevant, the forum's law as to the conflicts of laws.

Bernhardt v. Polygraph Co., supra;
Jackson v. Atlantic City Electric Co., 144 F. Supp. 551 (D.N.J. 1956).

Questions involving conflict of laws are present here by reason of the fact that the contract although to be performed for the most part in California was nevertheless made in Texas between a resident of Texas and a resident of California and it was at least partially executed and performed in Texas. [*e.g.* Clk. Tr. pp. 233-237, 148-149, 438; Paragraphs 5A, 5B of Pltf. Ex. 1 in evid.]. For our purposes it can be assumed that the performance of certain acts by Simi, such as the issuance of stock to Appellants, required formal action by the corporation at its principal place of business in Dallas, Texas. Under these circumstances, questions relating to the validity of the contract and the provisions thereof such as an arbitration clause are to be determined by applying the law of Texas and a California court will look to the law of Texas to determine the

validity or enforceability of this clause, as the law of the place where it was made.

Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 265 Pac. 190 (1928);

Cohen v. Metropolitan Life Ins. Co., 32 Cal. App. 2d 337, 89 P. 2d 732 (1939);

Restatement, Conflict of Laws §332.

Under Texas law, agreements to submit future disputes to arbitration are unenforceable, and can be revoked by the parties at any time before the award is made. An agreement in an executory contract to refer matters of dispute that may arise under the contract will not oust courts of jurisdiction and, when invoked for that purpose, will be held void.

Tejas Development Co. v. McGough Bros., 165 F. 2d 276 (5 Cir. 1947);

Florida Athletic Club v. Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10 (1898).

Since the question of the enforceability of the arbitration clause in this contract is one going to the validity of the contract Texas law would apply, and a Texas court would hold, under the rule as enunciated in the *Tejas* case, that the clause could not be asserted so as to deprive a court of jurisdiction.

Under the *Bernhardt* case, *supra,* the trial court was required to do likewise and it so ruled.

(b) Assuming, for purposes of argument, that California law must be applied, a stay would still not have

been proper. The controlling state statutes, under California law, are Sections 1280 and 1284 of the California Code of Civil Procedure. While these Code provisions set up an enforceable right to arbitration non-existent at common law (or under the law of Texas), they clearly do not provide an absolute right to arbitration merely because there is an arbitration clause in a contract. Rather, as the California Supreme Court in *Local 659, I.A.T.S.E. v. Color Corp. America,* 47 Cal. 2d 189, 302 P. 2d 294 (1956) has pointed out:

> ". . . a provision in a written contract to settle by arbitration a controversy arising out of the contract or the refusal to perform the whole or any part thereof 'shall be valid, enforceable and irrevocable, *save upon such ground as exist at law or in equity for the revocation* of any contract.' (emphasis added). It is thus indicated that there may be instances in which the right to enforce an arbitration provision is lost." (47 Cal. 2d at 194).

In this connection the decision of the Supreme Court of California in *Hanes v. Coffee,* 212 Cal. 777, 300 Pac. 963 (1931) is squarely in point. In that case plaintiff sought to quiet title to real property. Defendant claimed an interest in the property under a twenty year oil and gas lease but plaintiff contended that defendant's interest had terminated by reason of defendant's failure to comply with the terms of the lease and particularly, with the requirement that work be commenced within two years from the date thereof. De-

fendant asserted, among other defenses, a claim that the action was prematurely brought in that plaintiff failed to comply with an arbitration provision similar to the one involved herein. Answering this contention, the Supreme Court of California stated:

> "Conceding that this provision would be enforceable under our statutes, we do not think that it is applicable to the present controversy, in which the lessor contends that by reason of failure of the lessee to commence operations within the specified period, the lease never became operative, or if it did, is now terminated. The provision clearly does not contemplate that this question shall be submitted to arbitration, since if the allegations of plaintiffs' complaint are sustained, the result is that the lease, including the arbitration provision, is wholly inoperative, and the lessee can claim no rights thereunder." (212 Cal. at 779-780).

Similarly, in the instant case, the Appellees by repudiation of and failure to perform their express and implied obligations under the contracts, cannot now claim that while they have had no obligation to carry out the covenants imposed upon them, Appellants still were bound by the arbitration provision of the contracts

See also:

Abraham Lehr, Inc. v. Cortez, 57 Cal. App. 2d 973, 135 P. 2d 683 (1943);

Friedlander v. Stanley Productions, 24 Cal. App. 2d 677, 76 P. 2d 145 (1938); and

Feldman, Arbitration Law in California, 30 S.C.L.R. 375, 436 (1957).

(c) In *Robert Lawrence Co. v. Devonshire Fabrics,* 271 F. 2d 402 (2nd Cir. 1949) cited by Appellees, the Court, it is true adopted a restrictive view of the *Bernhardt* case and concluded that the Federal Arbitration Act established an entire new body of substantive law preempting the law of the respective states which prior thereto would have been applied.

The more reasonable interpretation of the decision reached in the *Bernhardt* case is that although prior to the adoption of the Federal Arbitration Act agreements to arbitrate involving commerce had been held invalid or unenforceable for policy reasons as ousting Courts of jurisdiction, now such agreements, pursuant to the provisions of the Act, become valid and enforceable *unless by other federal or state law such agreements are for other reasons held invalid, revocable or unenforceable.* Although the language in Section 2 might plausibly be read to support a broader view, it has been held that the legislative history reveals the intent of Congress to have been otherwise and that ambiguous statutory language ought not to be so read as to give it a reach beyond the Congressional intent as disclosed by the legislative history, among other things.

American Airlines, Inc. v. Louisville-Jefferson C. A. B., 269 F. 2d 811 (6th Cir. 1959);

Jackson v. Atlantic City Electric Co., supra.

C. Arbitration Would Have Been a Futile and Useless Act.

There is a further and equally compelling reason why arbitration should not have been permitted. The agreement between Appellants and Appellees provides in Paragraph (h) thereof as follows:

> "It shall be understood that, under Paragraph 8, I can at any time, at my option, reconvey the water lands to you and be relieved thenceforth of all obligations, if, in my opinion, the wells on the water lands are no longer capable of producing water in quantities sufficient to be commercially profitable to me, or if I deem that their operation is not economically feasible from my standpoint." [Pltf. Ex. 1 in evid.].

It is evident that this provision is totally inconsistent and at odds with the arbitration provision contained in Paragraph (f) and renders it meaningless for all practical purposes. It can be seen that even if the parties had resorted to arbitration, and even if Appellants had prevailed, Appellees in the exercise of their sole discretion as to sufficiency of water could have elected to relieve themselves of all obligations under the agreement by returning the wells and water lands to Appellants. Accordingly, an order requiring the parties to arbitrate could only have resulted in a futile and useless proceeding productive of nothing which would have assisted in eliminating the delay, harassment and expense of litigation which is the primary function of arbitration.

IV.

THE TRIAL COURT ERRED IN PRECLUDING APPELLANTS FROM FURTHER PROOF.

Appellees contend (Appellees' Br. Point IV, pp. 55-57) that there was no error precluding Appellants from further proof, because, they claim, the court was correct in holding, as a matter of law, that the contract could not be repudiated, and, also, because Mr. Riess' own testimony showed no repudiation in fact. The parties having stipulated to the dismissal of the jury, the power to make the factual determination is claimed to have been in the Court.

The first portion of this argument has been considered at length hereinabove (Point I), the circumstances under which Appellants are claimed to have stipulated to the dismissal of the jury is treated below (Point V). We consider here whether Mr. Riess' own testimony showed no repudiation in fact, and what effect, if any should be given to such testimony.

As the record shows, Mr. Riess was on the stand for three and one-half days; he was the first of a series of contemplated witnesses for Appellants. His testimony and the documents introduced during its course are summarized in Appellants' Opening Brief (pp. 7-8) and need not be repeated. In sum, Mr. Riess testified (as the trial court recognized) that Appellees, in a courteous and gentlemanly manner, and characterizing their position as a request for cooperation rather than as an ultimatum, unequivocally and categorically refused to construct the pipelines and reservoirs unless Appellants would first agree to accept late, partial performance as performance in full of their pipeline and reservoir con-

struction obligations. This construction being essential to the production of water for useful purposes, and such production being required before Appellants could be paid, this refusal was, obviously, critical. The fact that the refusal was conditional does not alter its significance as a breach, for Appellees had no right to extract such conditions. It is a settled rule of law that the annexing of an unwarranted condition to an offer of performance is in effect a refusal to perform.

Cal. Civ. Code, §1486;

Steelduct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 160 P. 2d 804 (1945);

Loop Bldg. Co. v. De Coo, 97 Cal. App. 354, 275 Pac. 881 (1929).

Also the fact that Appellants may have urged Appellees to perform the agreement does not preclude them from treating Appellees' refusal to perform as a renunciation and as a breach, nor does it indicate that Appellants agreed to the condition which Appellees sought to impose.

Loop Bldg. Co. v. De Coo, supra.

Furthermore, the matters set forth in Appellants' offer of proof [Clk. Tr. p. 275], far from being cumulative, demonstrate dramatically the calculated and devious character of Appellees' breach.

Appellees apparently feel that a categorical repudiation is required; obviously, such a thing rarely occurs. More frequently, the rubric must be constructed out of numerous facts, events, conversations and documents, and the pattern becomes clear only when all witnesses have testified and all of the documentary evidence is in.

To claim, as Appellees do, that the matter *must* be concluded against Appellants after only one witness has testified (and particularly in view of the testimony), is to engage in fantasy.

Appellants do not concede that the court could under the circumstances here involved make any determination of fact in this case. As we will demonstrate hereinbelow, Appellees find the court empowered to do so only by an amazing process of mental gymnastics (Point VI, *infra*).

V.

THE AGREEMENT OF THE PARTIES THAT THE $28,000.00 PAID PRIOR TO JUNE 12, 1956, WAS TO BE A CREDIT ON THE PURCHASE PRICE DOES NOT REQUIRE THAT THIS SUM ALSO BE A CREDIT AGAINST THE FIRST MONIES TO BECOME DUE UNDER THE CONTRACT.

Appellees contend (Appellees' Br. point V, pp. 57-58) that the sum of $28,000.00 was properly credited against the first monies to become due to Appellants from Appellees, after the payment of the judgment. Both sides concede, of course, that the sum of $78,000.00 (the $28,000.00 paid prior to June 12, 1956, and the $50,000.00 "down payment") were to be a credit on the purchase price. Appellants contend that this sum should be credited against the last monies due them, and Appellees contend that *part* of this sum, specifically $28,000.00, should be credited against the first monies due. The trial court, held that the sum of $28,000.00 should be credited against the first monies due following payment of the judgment. While this was manifestly done in an effort to do justice among

the parties in an abstract sense, there is no basis for this in the agreement, nor by application of any principle of law.

That the parties intended that the sum of $28,000.00 *not* be credited against the first monies due is manifest from the following:

(1) The sum was not treated separately by the parties, but rather was dealt with by them along with the $50,000.00 down payment, which concededly was not to be a credit against the first monies to become due. Indeed the very sentence of the agreement of June 12, 1956, upon which Appellees rely deals, not with the sum of $28,000.00, but rather with the sum of $78,000.00 which ". . . is, and shall be, of course, a credit on the purchase price of said water lands and other properties."

(2) The phrase "a credit on the purchase price" obviously refers not to "first moneys" but to the purchase price referred to in the agreement, which, despite Appellees' protestations, was and is one million dollars. The agreement says so in so many words. If the parties had intended a portion of the sum they were dealing with to be a credit against first monies they could easily have said so but in adopting the language they did they rendered inescapable the conclusion that the credit was to be applied in reduction of the entire purchase price and for no other purpose.

(3) Notwithstanding the last paragraph of Point V of Appellees' Brief (p. 58), Appellees' conduct was not consistent throughout with the construction of the agreement now adopted by them. Rather, commencing immediately upon the consummation of the agreement,

Appellees paid to Appellants the sum of $2,000.00 per month. Appellees continued to do so for fifteen months until $30,000.00 had been paid. If we were to adopt Appellees' present construction of the agreement, either no payments should have been made during the first fourteen months or, alternatively, the payments should have ceased after ten had been made. Indeed, it was only after the dispute arose among the parties that the contention was advanced that an offset of some sort was in order. It is a familiar rule of construction that the intention of the parties is best ascertained by their construction of the agreement prior to the time any dispute has arisen.

Brown v. Cowden Livestock Co., 187 F. 2d 1015, 1019 (9th Cir. 1951);

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F. 2d 541, 554 (9th Cir. 1950);

Bohman v. Berg, 54 Cal. 2d 787, 795, 8 Cal. Rptr. 441, 356 P. 2d 185 (1960);

Whalen v. Ruiz, 40 Cal. 2d 294, 253 P. 2d 457 (1953).

Appellees suggest that if Appellants' contention were correct then Appellants would have use of $28,000.00 of Appellees' funds for an indeterminate period without any compensation to Appellees for their use. This argument ignores the fact that no matter what the outcome of this litigation, Appellees have had the use of Appellants' property, valued by the parties at over one million dollars, for more than six and one-half years and that no compensation therefor has been paid since the latter part of 1957.

VI.

APPELLANTS HAVE BEEN DEPRIVED OF THEIR RIGHT TO TRIAL BY JURY.

Appellees suggest that the dismissal of the jury did not infringe upon Appellants' constitutional rights for two reasons, *first,* because the parties stipulated out of the case the only remaining factual issue, and, *second,* because the jury was dismissed upon the agreement and stipulation of the parties (Appellees' Br. point VI, pp. 58-59). The first point is treated above (Point IV, *supra*) but the second requires further comment.

In the first place, the sequence of the trial must clearly be borne in mind. After the trial judge had ruled on the anticipatory breach point as a matter of law, he further ruled that the only remaining issue was that of damages for the simple breach of contract. Taking the trial judge's ruling on the anticipatory breach point as correct, this latter ruling followed without dispute. The parties then stipulated for the purposes of the case as to the amount of damages for the simple breach and there were indeed no further issues to be tried. The transcript then sets forth the discussions of the parties with respect to what should be done procedurally, Appellants taking the position that the jury should be instructed to bring in a verdict in conformity with the court's legal rulings and the stipulation of the parties, and Appellees taking the position that the jury should be dismissed [Rep. Tr. pp. 493-507]. The court refused to instruct the jury and stated that the jury

should be dismissed, that findings should be made as to the undisputed and stipulated facts and the resultant conclusions of law. In view of the court's legal rulings with regard to the applicability of the doctrine of anticipatory breach to the contract before it and the court's refusal to instruct the jury, there was indeed no alternative remaining but to dismiss the jury and this was done.

It was after this, in fact several weeks after this, that the court adopted the findings of fact proposed by the Appellees, which, as we have indicated, purported to determine disputed issues of fact against the Appellants.

Appellees suggest that since the jury had been dismissed by stipulation it was within the power of the court to make such findings of fact. This contention ignores the obvious, that the jury had been discharged only upon the express assumption of the court and of the parties that no material issues of fact existed. The court could not reverse its position and find upon these issues adversely to Appellants without infringing upon Appellants' constitutional right to a trial by jury.

CONCLUSION.

It is apparent from the record before the Court that the Appellants have been grievously damaged by the wanton disregard, on the part of the Appellees, of their contractual obligations. Appellants are entitled to their day in court and to the due consideration of all of their

evidence by the jury. This having been denied, the judgment of the Court below should be reversed, and the cause remanded.

Respectfully submitted,

LOEB AND LOEB,
ALDEN G. PEARCE,
FRANK E. FEDER,
ROBERT A. HOLTZMAN,
Attorneys for Appellants and Cross-Appellees.

CERTIFICATE.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT A. HOLTZMAN